

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

In Re:)	
)	No. 05-09692-W13
DARYL JANE JOHNSTON,)	
)	
Debtor.)	
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ROSE TOWNSEND TRUST,)	No. 06-80040-PCW13
)	
Plaintiff,)	
vs.)	
DARYL JANE JOHNSTON, a single)	MEMORANDUM DECISION RE:
person, et al.,)	MOTION FOR STAY PENDING
)	APPEAL
Defendants.)	
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THIS MATTER came before the Court on August 13, 2007 on Defendant New Century Mortgage Corporation's (hereinafter "New Century") motion seeking a stay pending appeal. The issue is whether this Court should grant the motion and, if so, should the posting of a supersedeas bond be waived. This Court concludes that New Century's request for a stay pending appeal should be denied because New Century does not satisfy the four-part test required for a discretionary stay pending appeal. The facts are set forth below.

I. FACTS

Defendants Johnston and Arney each hold a one-half interest in the residence which is the subject property of this matter. The Defendants own the home as joint tenants. In 1994, both Defendants signed a Deed of Trust on the property in favor of North American

1 Mortgage for the principal amount of \$265,500.

2 On January 22, 1998, Plaintiff Rose Townsend Trust
3 (hereinafter "Townsend") obtained two Spokane County State Court
4 judgment liens against Defendant Johnston, totaling \$76,847.31.
5 The first judgment was in the amount of \$76,147.37, with interest
6 accruing at twelve (12) percent per annum from January 22, 1998,
7 and was recorded with the Spokane County Auditor. The second
8 judgment was in the amount of \$700.00, with interest accruing at
9 twelve (12) percent per annum from January 22, 1998, but was not
10 recorded.

11 On July 16, 1999, Defendant Johnston filed a Chapter 7
12 bankruptcy proceeding. A discharge was entered on October 14, 1999,
13 but two years later, Defendant Johnston's discharge was revoked due
14 to fraud and concealment of property.

15 The Chapter 7 Trustee obtained a default judgment against
16 Defendant Johnston on January 19, 2001. The default judgment
17 amounted to \$132,044.73. In that asset case, Townsend filed a
18 Proof of Claim in the amount of \$83,183.37. The amount was based
19 upon its 1998 state court judgments. According to Townsend, the
20 Proof of Claim was initially filed as unsecured because Townsend
21 relied on the bankruptcy schedules, which listed the amount owed to
22 North American Mortgage Company as \$256,401.87 and the fair market
23 value of the property at \$284,400. Because Defendant Johnston was
24 a joint tenant, the estate only had a one-half interest in the
25 home. As a result, Townsend believed there was insufficient equity
26 in the home to secure its judgment liens.

27 Defendant Arney also filed Chapter 7 bankruptcy and on
28 January 19, 2001, the Chapter 7 Trustee obtained a default judgment

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1 against Defendant Arney in the amount of \$80,150.00. The Chapter
2 7 Trustee obtained the default judgment for concealment of estate
3 property. Neither default judgment obtained by the Trustee against
4 Defendants Johnston and Arney was recorded with the Spokane County
5 Auditor.

6 On October 6, 2004, almost four years after entry of the
7 judgments by the Chapter 7 Trustee against Defendants Arney and
8 Johnston, the Defendants refinanced their shared home. For unknown
9 reasons, Townsend's state court judgments and the Chapter 7
10 Trustee's bankruptcy judgments were not satisfied by the refinance.
11 The refinance provided both debtors with a cash distribution
12 totaling \$81,270.89.

13 On April 6, 2005, about six months later, Defendants Johnston
14 and Arney again refinanced the home, this time with New Century.
15 New Century loaned Defendants Johnston and Arney \$382,500. In
16 return, New Century acquired a Deed of Trust on the subject
17 property. The debtors jointly received \$16,808.73 from the second
18 refinance, but the title report relied upon by New Century did not
19 reveal the existence of Townsend's judgments nor those held by the
20 Chapter 7 Trustee. As a result, none of the judgments were
21 satisfied.

22 On July 21, 2005, only three and a half months after
23 refinancing, the Chapter 7 Trustee assigned the bankruptcy default
24 judgments against Defendants Arney and Johnston to Townsend. A
25 chain of title report issued in November, 2005, revealed the
26 bankruptcy judgments and New Century's Deed of Trust. In addition,
27 the title report revealed that Defendant Arney had filed a second
28 Chapter 7 bankruptcy petition on October 13, 2005, and Defendant

1 Johnston filed for Chapter 13 bankruptcy on the same day. The
2 schedules in both bankruptcy proceedings listed the New Century
3 obligation at \$382,5000 and the fair market value of the property
4 at \$425,000. Each Defendant claimed a one-half interest in the
5 property. Neither Defendant, however, listed Townsend's two state
6 court judgment liens in their respective schedules.

7 Townsend filed a secured Proof of Claim in Defendant
8 Johnston's Chapter 13 proceeding in the amount of \$206,973.79, but
9 Johnston objected that the judgments held by Townsend did not
10 constitute liens against the home. In response, Townsend filed
11 this adversary proceeding on February 3, 2006, to determine if it
12 held valid judgment liens resulting from the above four judgments
13 - two state court judgments and two assigned bankruptcy default
14 judgments - and whether either of the Defendants were entitled to
15 a homestead exemption in the property.

16 On September 26, 2006, Townsend obtained an order from this
17 Court declaring that the four judgments held by Townsend were
18 superior to and had priority over New Century's Deed of Trust.
19 After hearing oral argument, this Court entered an order granting
20 Townsend's Motion for Summary Judgment, determining that Townsend
21 had a first priority lien in the subject matter property, which is
22 superior to New Century's Deed of Trust, and that neither Defendant
23 Johnston nor Arney could claim homestead rights in the real
24 property.

25 On October 6, 2006, New Century filed a notice of appeal
26 relating to the summary judgment order and the appeal was
27 transmitted to the U.S. District Court for the Eastern District of
28 Washington. On the same day, New Century moved for a stay pending

1 appeal to stay all execution, foreclosure, or other enforcement of
2 Townsend's four judgments. Townsend's reply requested that any
3 stay authorized by this Court be accompanied by a supersedeas bond
4 in the amount of \$612,591.21. No hearing was requested on the
5 motion to stay.

6 On April 2, 2007, six months after moving for a stay pending
7 appeal, New Century filed for bankruptcy in the District of
8 Delaware. On August 7, 2007, after the automatic stay had been
9 lifted by the Delaware Bankruptcy Court, oral argument on the
10 appeal was set for September 20, 2007. Nearly eleven (11) months
11 after moving for a stay pending appeal, New Century requested a
12 hearing regarding its motion for stay pending appeal and also asked
13 that Townsend's request for a \$612,591.21 supersedeas bond be
14 denied.

15 II. DISCUSSION

16 The issue is whether this Court should grant Defendant New
17 Century's request for a discretionary stay pending appeal and, if
18 so, should the posting of a supersedeas bond be waived. New
19 Century requested the stay pending appeal pursuant to
20 F.R.B.P. 8005. The purpose of Rule 8005 is to maintain the
21 status quo by protecting "the property rights and interests of the
22 parties stayed (i.e., decrease in the value of the interests
23 affected)." *In re Victory Const. Co., Inc.*, 9 B.R. 570, 573
24 (Bankr. C.D. Cal. 1981). Here, New Century is seeking to prevent
25 Townsend from foreclosing on the subject property prior to the
26 completion of the appeal.

27 A bankruptcy court has discretion under F.R.B.P. 8005 whether
28 to grant a stay pending appeal. *Scripps-Howard Radio, Inc. v.*

1 *Federal Communications Commission*, 316 U.S. 4, 10 (1942); *In re*
2 *Byrd*, 172 B.R. 970 (Bankr. W.D. Wash. 1994). The Ninth Circuit
3 recognizes the authority of federal courts to stay judgments and
4 orders pending appeal. See *In re Wymer*, 5 B.R. 802, 804 (9th Cir.
5 B.A.P. 1980) (noting the various types of stays).

6 New Century may obtain a discretionary stay pending appeal
7 without posting a supersedeas bond, so long as it meets the
8 necessary requirements. The Ninth Circuit has adopted a four-part
9 test for determining if a discretionary stay should be granted.
10 The discretionary stay is appropriate if: (1) appellant is likely
11 to succeed on the merits of the appeal; (2) appellant will suffer
12 irreparable injury; (3) no substantial harm will come to appellee;
13 and (4) the stay will not harm public interest. *In re Wymer*,
14 *supra*, at p. 806 (citing *Schwartz v. Covington*, 341 F.2d 537 (9th
15 Cir. 1965) and *In re Byrd*, *supra*). While the first three parts are
16 in dispute, the public interest part is not a factor because the
17 current matter only involves two private creditors.

18 **A. New Century is Unlikely to Succeed on the Merits of the**
19 **Appeal.**

20 Under the first factor, New Century argues that it only needs
21 to show a substantial case on the merits because serious legal
22 questions are raised and the balance of the equities tips sharply
23 in its favor. In support of its position, New Century relies upon
24 Fifth Circuit cases that are not controlling in this District. See
25 *Ruiz v. Estelle*, 650 F.2d 555 (5th Cir. 1981) (applying the standard
26 to the Federal Rules of Civil Procedure); see also *Arnold v.*
27 *Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001) (applying the standard
28 to a request for a stay of an order for remand).

1 Although New Century suggests that *Lopez v. Heckler*, 713 F.2d
2 1432 (9th Cir. 1983), *rev'd on other grounds*, 469 U.S. 1082 (1984),
3 applies a preliminary injunction standard to all cases evaluating
4 stays pending appeal, *Lopez* is not a bankruptcy court case and does
5 not rely upon F.R.B.P. 8005. See *Hilton v. Braunskill*, 481 U.S.
6 770 (1987) (applying the preliminary injunction standard to the
7 Federal Rules of Civil Procedure). Cf. *Continental Securities*
8 *Corp. v. Shenandoah Nursing Home Partnership*, 188 B.R. 205, 208
9 (W.D. Va. 1995) (clearly stating that "the Fourth Circuit requires
10 a party seeking a stay to meet the same criteria movants for a
11 preliminary injunction must meet in seeking their relief."); *but*
12 *see In re Zaleha*, 162 B.R. 309, 317-18 (Bankr. D. Idaho 1993)
13 (adopting the preliminary injunction standard). Instead, *Lopez*,
14 *supra*, and its supporting authority apply the standard to non-
15 bankruptcy proceedings involving interlocutory appeals for
16 preliminary injunctions. As a result, New Century must do more
17 than merely present a substantial case on the merits, it must show
18 that it is likely to succeed on the merits.

19 New Century presented a number of arguments on summary
20 judgment, including judicial estoppel, waiver, equitable
21 subordination, and recording. This Court found each of these
22 arguments unpersuasive. With regard to judicial estoppel, this
23 Court found that Townsend's filing of an unsecured Proof of Claim
24 in the 1999 Johnston Chapter 7 was not inconsistent with its later
25 argument it was secured under state law. In addition, that
26 unsecured Proof of Claim was not inconsistent with Townsend's later
27 claim of a first position perfected lien in this adversary
28 proceeding. Also, the judicial estoppel argument was rejected

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1 because Townsend did not obtain an unfair benefit from the alleged
2 inconsistency. New Century also argued that by waiving any right
3 to participate in the distribution from the Chapter 7 liquidation,
4 Townsend waived the right to now enforce its claim under the state
5 court judgments. New Century, however, did not cite any
6 controlling authority for the proposition that the waiver of a
7 claim against a bankruptcy estate operates as a waiver of that
8 claim against non-debtor third parties such as New Century.

9 With regard to New Century's equitable subordination argument,
10 New Century did not reference, and the evidence did not reveal, any
11 improper or inequitable conduct on behalf of Townsend or the
12 Chapter 7 Trustee who obtained the judgments.

13 Finally, Townsend's state court judgment in the amount of
14 \$76,147.31 was both entered by the state court and recorded in the
15 Spokane County Auditor's office. New Century's reliance on a
16 preliminary title report, which does not reveal the existence of
17 this judgment, is no basis for concluding that Townsend's judgment
18 lien is inferior to New Century's Deed of Trust.¹ In addition,
19 RCW 4.56.190 provides that every judgment of a Superior Court
20 creates a lien upon real property. Judgment liens commence "from
21 the time of entry or filing." RCW 4.56.200 (2007). Recording with
22 the Country Auditor is not necessary to perfect, effectuate, or
23 attach the lien.

24 With regard to the two judgments entered by this Court,
25 RCW 4.56.200(1) states federal district court judgments create

27 ¹This Court is unaware of whether New Century had title
28 insurance and, if so, whether New Century has filed a claim against
any insurer.

1 judgment liens upon real estate of the judgment debtor, in the
2 federal district, at the time the judgment is filed. See also
3 28 U.S.C. § 151 and E.D. Wash. Local Rules 77.1 and 83.5 (referring
4 to the location and status of this Court as a section of the
5 Federal District Court for the Eastern District of Washington).

6 The conclusion of this Court was that the two 1998 state court
7 judgments became enforceable judgment liens against the subject
8 property upon entry by the state court, and that the two 2001
9 judgments entered by this Court became enforceable judgment liens
10 against the subject property upon entry by this Court. No further
11 recording was necessary.

12 In order to succeed on the merits of the appeal, New Century
13 must overturn this Court's conclusions regarding the summary
14 judgment motion. It is not likely that New Century will be able to
15 do so.

16 **B. New Century Will Not Suffer Irreparable Harm.**

17 Under the second factor, New Century argues that Townsend
18 could complete foreclosure proceedings before the District Court
19 decides the appeal, which would render the matter moot. Although
20 an appeal becomes moot when the assets in a dispute are sold, the
21 Ninth Circuit has not held that mootness constitutes an irreparable
22 injury. In *In re Ewell*, 958 F.2d 276, 279 (9th Cir. 1992), the
23 Ninth Circuit did state that the sale of estate property does
24 render an appeal moot because the Court would be unable to restore
25 the status quo. Regardless, neither *Ewell*, *supra*, nor any
26 subsequent Ninth Circuit case has held that mootness constitutes an
27 irreparable injury. Cf. *In re Fullmer*, 323 B.R. 287, 304 (Bankr.
28 D. Nev. 2005) (holding that "the risk an appeal may become moot

1 does not by itself constitute irreparable injury."). Consequently,
2 New Century cannot simply rely on the potential mootness of the
3 matter to satisfy the irreparable injury requirement.

4 Even if mootness constitutes an irreparable injury, New
5 Century's argument is no longer valid. The motion for stay pending
6 appeal was filed approximately eleven (11) months ago. The oral
7 argument regarding the merits of the appeal is scheduled for
8 September 20, 2007. The initial lack of action regarding that
9 motion and the scheduling of oral argument on the appeal may have
10 eliminated the possibility that Townsend could foreclose the
11 judgment liens pursuant to RCW 6.21, et. seq., prior to an
12 appellate decision. Foreclosure could not be accomplished in less
13 than thirty (30) days and, as a practical matter, would generally
14 require about sixty (60) days. See RCW 6.21.030.

15 Further, Defendant Johnston's confirmed Chapter 13 plan states
16 that Defendant Johnston will continue to make \$1,300 monthly
17 payments to New Century. New Century is receiving regular payments
18 under its Deed of Trust whereas Townsend is not receiving any
19 payments on the judgments. As a result, New Century will not
20 suffer irreparable harm.

21 **C. Substantial Harm Will Come to Townsend.**

22 In addition to proving irreparable harm to itself, New Century
23 must show that Townsend will not suffer a substantial injury from
24 the stay. New Century argues that recent housing trends and future
25 outlooks suggests that the subject property will continue to
26 appreciate in value, thus protecting Townsend.

27 According to RCW 4.56.110 and 19.52.020, statutory interest on
28 judgments accrue at an annual rate of twelve percent (12%).

1 Evidence submitted by New Century demonstrates that home prices in
2 the Spokane metropolitan statistical area increased 10.4 percent
3 (10.4%) in the second quarter of 2007, when compared to the second
4 quarter of 2006, and that the estimated yearly rate of appreciation
5 for 2007 is approximately six percent (6%). This appreciation does
6 not equal the interest accruing on the judgments. As Townsend
7 receives no payments from the debtors and New Century does receive
8 regular monthly payments from the debtor, there is harm to Townsend
9 resulting from its inability to foreclose.

10 **III. CONCLUSION**

11 This Court concludes that New Century's request for a stay
12 pending appeal is **DENIED** because New Century does not satisfy the
13 four-part test required for a discretionary stay pending appeal.
14 New Century is unlikely to succeed on the merits of the appeal and
15 will not suffer irreparable harm. In addition, Townsend would be
16 substantially harmed from the imposition of a stay. New Century's
17 Motion for Stay Pending Appeal is **DENIED**.



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A handwritten signature in cursive script, reading "Patricia C. Williams".
Patricia C. Williams
Bankruptcy Judge